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\*NOT ADMITTED TO THE NEW YORK BAR

July 19, 2010

**BY ECF & HAND**The Honorable William H. Walls  
United States District Judge  
Martin Luther King, Jr. Federal Building & U.S. Courthouse  
50 Walnut Street  
Newark, NJ 07101Re: *Gutierrez, et al. v. Johnson & Johnson*  
Civil Action No. 01-5302

Dear Judge Walls:

On Friday, July 16, 2010, Plaintiffs filed two unauthorized submissions: (1) a second new declaration from their statistical expert, Dr. Janice Madden, purporting to address occupational diversity, and (2) a revised proposed order with a purported trial plan. We respectfully request that the Court strike these unauthorized submissions, or if the Court intends to consider them, permit Johnson & Johnson the opportunity to respond to them in detail.

The Court's July 9 letter authorized Plaintiffs to make only one submission – a list of cases they claim involved certified classes as diverse as the one they seek here. Indeed, the Court closed the hearing on Plaintiffs' renewed motion for class certification on July 8 making it clear that this was all that Plaintiffs were to submit

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The Honorable William H. Walls

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and that Your Honor did not want further briefing or papers from Plaintiffs. Therefore, Plaintiffs' additional submissions are unauthorized and should be stricken.

If Your Honor considers Plaintiffs' additional submissions, we respectfully request the opportunity to respond in detail. Plaintiffs' submissions are deeply flawed. By assessing occupational diversity solely by the number of broad EEO-1 categories, Dr. Madden's declaration ignores the great diversity of jobs within those categories. For example, her position would treat accountants, computer specialists, chemists, physicians, lawyers, and the many other diverse job types, as shown on the slide I presented at oral argument (see attached), across the more than 30 different operating companies in very different businesses as the same. That makes no sense in the context of Plaintiffs' claims and the enormous manageability problems presented here. Dr. Madden's conclusion that other cases involved greater occupational diversity than this one is based on this faulty position and, therefore, is wrong. In addition, at least two of the cases she cites involved class certification for settlement only, which does not require consideration of trial manageability. See *Amchem Products v. Windsor*, 521 U.S. 591 (1997).

Plaintiffs' belated trial plan also creates numerous problems and is unworkable. It seeks a) unidentified supplemental discovery to be completed within 75 days of the order – after nearly 9 years of discovery and litigation; b) compensatory and punitive damages for the named plaintiffs, and not for the class - creating a conflict between themselves and the class; c) vaguely described Stage I and Stage II proceedings, including use of an arbitrary back pay formula and dealing with the need for thousands of individualized hearings only by vaguely suggesting that individualized hearings on back pay could be conducted, "where necessary or appropriate" by a Special Master; and d) unworkable and unjustified injunctive class-wide relief, including relief addressing a matter – job posting – that is not addressed at all either by Dr. Madden or Plaintiffs' industrial organizational psychology expert Dr. Richard Martell.

For all of these reasons, the Court should strike Plaintiffs' unauthorized submissions. If the Court is inclined to accept Plaintiffs' submissions, we respectfully request the opportunity to respond in more detail.

Respectfully submitted,

*Theodore V. Wells, Jr. (MKK)*

Theodore V. Wells, Jr.

Enclosure

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